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In the Supreme Court of the United States

OCTOBER TERM 1959

No. 153

MISS CLAUDIA WALKER,
Petitioner,
v.
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and TRANSAMERICA CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent Bank of America National Trust and Savings Association in Opposition

SAMUEL B. STEWART
KENNETH M. JOHNSON
ROBERT T. SHINKLE
[illegible]
Counsel for Respondent Bank

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OPINIONS BELOW

The Opinion of the District Court was not reported. The Opinion of the Court of Appeals for the Ninth Circuit is reported in 268 Fed. 2d 16 (1959) and is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 22, 1959. Rehearing was denied on August 21, 1959. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

There appear to be one major question and three supplemental questions presented in this case. These are as follows:

1. The major issue is whether the District Court was correct in granting respondents' motions to dismiss on lack of jurisdiction because of a failure as to diversity of citizenship and a failure to state a federal question. The action of the District Court was affirmed by the Court of Appeals.

2. A supplemental question is whether respondents' motions to dismiss were timely made.

3. A further supplemental question is the possible conflict between 12 USC 94 and 28 USC 1348 and the contention made by petitioner that 28 USC 1348 is unconstitutional. This question of constitutionality is raised for the first time in the Petition.

4. A further supplemental question is whether any basis for jurisdiction is supported by petitioner's allegations in her original Complaint of violation of the national banking laws by this Respondent.

STATUTES INVOLVED

Constitution of the United States, Article III, Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a

State, or the Citizens thereof, and foreign States, Citizens or Subjects. * * *"

12 USC 93 (36 Stat. 1167).

"*Violation of provisions of chapter; forfeiture of franchise; personal liability of directors.* If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

12 USC 94 (18 Stat. 320).

"*Venue of suits.* Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

28 USC 1348 (62 Stat. 933).

"*Banking association as party.* The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof,

against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

42 USC 1985(3) (R.S. § 1980).

"*Depriving persons of rights or privileges.* (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his

person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Federal Rules of Procedure Rule 12(h).

"*Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

STATEMENT OF THE CASE

In so far as respondent bank is concerned, the gravamen of petitioner's complaint, which was filed on October 24, 1955, is concerned with employee-employer relationships between petitioner and respondent bank in 1939; particularly petitioner complains of failure by respondent bank to give certain notices in connection with alleged workmen's compensation claims. In the original complaint there were extensive claims as to resulting loss and damage to

petitioner and there are many references to alleged improper acts by others including Stanford-Lane Hospital, Judges of California Courts, a former Governor of California, the present Governor of California, a former United States Attorney in San Francisco, J. Edgar Hoover and others. The complaint originally invoked the jurisdiction of the District Court on the grounds of diversity of citizenship and the complaint as amended attempted to support jurisdiction upon federal questions based on the Civil Rights Statute, 42 USC 1985(3) and upon alleged violations of national banking laws on the part of respondent bank.

Respondents moved to dismiss the complaint because of lack of jurisdiction in the District Court on the grounds that there was no diversity of citizenship and no federal question. The District Court granted respondents' motion to dismiss. This was by way of a Memorandum and Order dated January 28, 1958. Subsequently petitioner filed four motions, all of which were attacks in one way or another on the Order dismissing the action. Except in a single instance where there was a substitution of certain language, all of these motions on the part of the petitioner were denied by the District Court.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which upheld the decision of the District Court and the Opinion is attached hereto in the Appendix.

ARGUMENT

Since there appears to be no conflict with the decision of another Court of Appeals on the same matter, it appears to be that the only basis upon which the Petition can rest is that it indicates an important question of federal law which has not been but should be settled by this

Court. The question of the jurisdiction of the District Court does not appear to be such a question. Petitioner and respondent bank were citizens of the same state and thus there could be no jurisdiction on the basis of diversity of citizenship. That the District Court was correct, is clear without a doubt. This matter is adequately covered in the Opinion of the Court of Appeals (Appendix pages 7 and 8) and need not be restated here.

It also appears to be clear that contrary to the suggestion of petitioner, a motion to dismiss for lack of jurisdiction may be made at any time. Federal Rules of Civil Procedure, Rule 12(h). *Page v. Wright*, 116 F.2d 449 (7th Cir., 1940).

Possible Conflicts Between 12 USC 94 and 28 USC 1348 and the Constitutionality of the Latter Section.

A simple reading of 12 USC 94 indicates that it is primarily a statute as to venue and does not purport to enlarge the jurisdiction of the federal courts which must be found in other statutes. *Bachman v. First Mechanics National Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J. 1947), *Reed v. American German National Bank*, 155 Fed. 233 (CC Ky. 1907).

The substance of 28 USC 1348 was originally enacted in 1888 and a search of the authorities cited thereunder has failed to indicate any prior attempt to challenge its constitutionality. Viewed in the light of the words of Section 2, Article III, of the Constitution it would appear that this definition of citizenship is well within the powers of Congress even though Article III should be narrowly construed. To be perfectly candid, respondent bank confesses that it does not understand the argument of petitioner in this connection. While of course the constitu-

tionality of any act of Congress is a question of federal law, this particular contention of petitioner appears to have such little substance that it can in no manner be deemed important.

Alleged Violation of National Banking Laws and Civil Rights Act.

On Page 17 of the Petition there appears to be the contention that the alleged violation of certain national banking laws by respondent bank supports the jurisdiction of the District Court. However, this would appear to be completely answered by 12 USC 93 which provides that actions based on violations of the national banking laws shall be brought by the Comptroller of the Currency and against the Directors who participated in or assented to the same. *Whitemore v. Amoskeag National Bank*, 134 U.S. 527 (1890).

Although the point is not made to any extent in the Petition for Certiorari, in the District Court and in the Court of Appeals, petitioner did seek to invoke jurisdiction under the Civil Rights Act, particularly 42 USC, 1985(3). That the acts complained of in this case are not those covered by the Civil Rights Statutes would appear to be clear and respondent bank cannot improve upon the analysis by the Court of Appeals found in its Opinion (pages 9, 10, 11 and 12 of Appendix).

In summary, it may be said that every ground upon which petitioner sought to establish jurisdiction in the District Court falls and that the determinations of both the District Court and the Court of Appeals in this regard are correct.

CONCLUSION

In conclusion it appears that the Petition fails entirely to state an important question of federal law which has not been but should be settled by this court and that for this reason it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

October 15, 1959.

Respectfully submitted,

SAMUEL B. STEWART
KENNETH M. JOHNSON
ROBERT T. SHINKLE
Counsel for Respondent Bank of America N. T. & S. A.

(Appendix Follows)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 16,056—May 22, 1959

Claudia Walker,
Appellant,
vs.
Bank of America National Trust and Savings Association, and Transamerica Corporation,
Appellees.

Appeal from the United States District Court for the Northern District of California Southern Division

Before: Pope, Chambers, and Hamley, Circuit Judges

Hamley, Circuit Judge:

Appearing in propria persona, Claudia Walker brought this action to recover special and general damages in the sum of $1,056,996. Named as defendants in the original complaint were Bank of America National Trust and Savings Association (Bank of America) and Transamerica Corporation (Transamerica). Responsive to a motion made by defendants, the district court dismissed the action for lack of jurisdiction.

Plaintiff thereafter made in succession four motions designed to reinstate the lawsuit.[1] The district court entered

1. Motion to set aside the order of dismissal and for leave to file an amended complaint (denied by order of April 18, 1958); motion to correct the memorandum and order of dismissal (denied

orders denying in whole or in part the first three of these post-dismissal motions. Plaintiff then appealed from these orders and from the original order of dismissal. In her notice of appeal, plaintiff also anticipated possible adverse action on the fourth post-dismissal motion and sought to include any such future order in her appeal. An order was thereafter entered denying this fourth motion.

We direct our attention first to the appeal from the original order dismissing the action. Bank of America has moved for dismissal of the appeal as to it, arguing that the appeal was not timely.

The order dismissing the action was entered on January 28, 1958. The time for filing a notice of appeal would thus normally expire thirty days later, i.e., on February 27, 1958. Rule 73(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

It is further provided in this rule, among other things, that the running of the time for appeal is terminated by a timely motion to alter or amend the judgment, made pursuant to Rule 59(e), Federal Rules of Civil Procedure. In the event such a motion is timely made, the full time for appeal commences to run and is to be computed from the entry of an order granting or denying the motion.

It is provided in Rule 59(e) that a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment. On February 7, 1958, which was within this ten-day period, appellant served and filed a motion to set aside the order of dismissal and for leave to file an amended complaint. In effect, this motion was to alter or amend the order of dismissal by changing the decretal provision from a dismissal of the action to a dismissal

in part by order of May 7, 1958); motion for relief from the order of dismissal made on the ground of newly discovered evidence (denied by order of May 13, 1958); and motion for relief from the order of dismissal made on the ground of fraud (denied by order of May 19, 1958).

of the complaint, and by adding a provision granting leave to file an amended complaint and to drop a party defendant.

The order denying this motion was entered on April 18, 1958. Under Rule 73(a), therefore, appellant had until May 18, 1958, to take an appeal from the order of dismissal entered on January 28, 1958. Her appeal was taken on May 16, 1958, and would therefore seem to be timely.

Counsel for Bank of America, however, points out that the motion to alter or amend the judgment was made for the purpose of enabling appellant to file an amended complaint in which only Transamerica was named a defendant. Since it was thus proposed to drop Bank of America as a party, the argument is made that the motion could not, as to the bank, extend the time for taking an appeal from the order of dismissal. Counsel for the bank further argues that it was in fact necessary that the action remain dismissed as to the bank if appellant expected to continue the suit only against Transamerica, as contemplated by the proposed amended complaint.

If appellant's motion and the tendering of the amended complaint are to be regarded as acquiescence in the order of dismissal as to Bank of America, the latter's position, as set out above, has merit. It seems to us, however, that appellant, faced with the order of dismissal, was reluctantly seeking to save as much of the lawsuit as possible, without conceding that the order of dismissal was correct as to the bank.

Both the original and the proposed amended complaint were designed to establish jurisdiction on the basis of diversity of citizenship. But appellant also asserted jurisdiction on other grounds, to be hereinafter discussed, which she has not abandoned and here renews. Under these circumstances it is our view that the extension of time accomplished by the serving of the motion to alter or amend the

judgment is effective as to Bank of America as well as Transamerica.

The motion to dismiss the appeal as to Bank of America from the order of January 28, 1958, is therefore denied.

Appellant argues that the court erred in entering the order dismissing the action because appellees' motions to dismiss were not timely.

A review of the docket entries convinces us that the motions to dismiss were filed within the time specified in Rule 12(a), Federal Rules of Civil Procedure, 28 U.S.C.A., as enlarged by the court pursuant to Rule 6(d). In any event it is provided in Rule 12(h) that a motion to dismiss for lack of jurisdiction may be made at any time.[2]

Appellant further contends that the allegations of the original complaint, as amended and proposed to be amended prior to dismissal of the action, show jurisdiction and that the district court erred in holding otherwise.

In the complaint it is alleged that in 1939 Miss Walker was an employee of Bank of America, a national banking association, of its affiliate, Bankamerica Agricultural Credit Corporation, and of Transamerica, a Delaware corporation of which Bank of America was a wholly-owned subsidiary. It is further alleged that on October 23, 1939, she resigned

2. See Corcoran v. Royal Development Co., D.C.N.Y., 35 F. Supp. 400, aff. 2 Cir., 121 F.2d 957; Louisville & N. R. Co. v. United States, D.C. Ky., 106 F. Supp. 999, aff. 6 Cir., 221 F.2d 698. Appellant may also be contending that appellees' appearances in connection with their motions were general appearances and that they thereby submitted to personal jurisdiction. But the jurisdiction which appellees question is not jurisdiction over the person, but jurisdiction over the subject matter. A general appearance does not establish jurisdiction over the subject matter. See Romero v. International Terminal Operating Co., S.D.N.Y., 142 F. Supp. 579, 572, aff. 2 Cir., 244 F.2d 409. Nor does it even operate to prevent a subsequent contest of the court's jurisdiction over the person, if otherwise timely. Blank v. Bitker, 7 Cir., 135 F.2d 962, 966; Emerson v. National Cylinder Gas Co., D. Mass., 131 F. Supp. 299, 301.

this employment on account of ill health.[3] It is alleged that her illness, which included a nervous breakdown, resulted from worry and strain occasioned by close contact with a wide variety of assertedly improper and illegal banking practices by her superiors, inadequate salary, and an unreasonably heavy work load. It is also alleged that her resignation was wrongfully demanded because she had informed the Securities and Exchange Commission of certain assertedly illegal practices being carried on by Bank of America, Transamerica, and subsidiaries of the latter company.

The complaint also contains allegations to the following effect: After her resignation Miss Walker was illegally committed to the Stockton State Hospital.[4] An attorney, Arthur Brouillet, employed by her mother, notified officials of Bank of America of Miss Walker's illness and of the immediate need for funds in the sum of two hundred dollars for medical care. Notwithstanding receipt of this notice of her illness, defendants fraudulently concealed from Miss Walker's next of kin—her mother—that Miss Walker was entitled to six thousand dollars in workmen's compensation benefits from the State of California. Miss Walker did not learn until 1948 that the bank had been given timely notice of the illness. It was not until about November 15, 1953, that she received proof that the bank had received such notice. This proof consisted of copies of letters which Brouillet had written to the bank and to appellant's mother in December 1939.

All of the assertedly fraudulent and unlawful acts referred to above, it is alleged, were accomplished by appel-

3. Although Miss Walker's service was terminated at this time, she was retained on the payroll until January 23, 1940.

4. It is alleged that because of the illegality of this commitment the record thereof was officially expunged on February 1, 1946.

lees individually and in conspiracy with each other and with certain state and federal officials and agencies. As a result, appellant alleges, she underwent a long period of illness, was unnecessarily and illegally committed to an institution, and suffered physical pain, mental suffering, humiliation, and damage to reputation. General damages in the sum of one million dollars and special damages in the sum of $56,996 are sought.[5]

Before any responsive pleading was served, Miss Walker amended her complaint by adding thereto a new paragraph XV. By this amendment appellant sought to invoke jurisdiction under the Civil Rights Act, particularly 28 U.S.C.A., sec. 1343, and 42 U.S.C.A., secs. 1983 and 1985(3). Appellant later moved for leave to further amend her complaint by adding twenty-five additional pages thereto, comprising new paragraphs XVI to XXVI, and adding a prayer for declaratory relief. The new paragraphs thus sought to be added deal in the main with the question of jurisdiction, no additional substantive claims for relief being asserted.[6]

The original complaint, as amended by the addition of paragraph XV, and as proposed to be amended by the addition of paragraphs XVI to XXVI, alleges facts designed to show jurisdiction on three grounds. These are: (1) Diversity of citizenship, pursuant to 28 U.S.C.A., sec. 1332; (2) existence of a federal question, pursuant to 28

5. The twenty-seven-page complaint contains a great many other allegations, most of which are redundant or immaterial and some of which are impertinent and scandalous within the meaning of Rule 12(f), Federal Rules of Civil Procedure.

6. The motion for leave to make this further amendment was heard at the same time that the court heard argument on the motions to dismiss. While the order which was entered as a result of this hearing makes no separate mention of the motion for leave to amend, the order dismissing the action in effect denied that motion.

U.S.C.A., sec. 1331; and (3) deprivation of civil rights, pursuant to 28 U.S.C.A., sec. 1343, and 42 U.S.C.A., secs. 1983 and 1985(3). We will consider, seriatim, these three asserted grounds of jurisdiction.

There can be no diversity of citizenship if the plaintiff is of the same state citizenship as any one of the defendants, since diversity must be complete. Baltimore & Ohio R. Co. v. Parkersburg, 268 U.S. 35. In order to show diversity jurisdiction, it was therefore necessary for Miss Walker, a citizen of the State of California, to allege facts establishing that Bank of America and Transamerica were not citizens of the State of California.[7] This was done in the original complaint in the case of Transamerica, it being alleged that this company was incorporated in Delaware.[8]

In the case of Bank of America, however, it is alleged in the original complaint that this defendant is a national banking association organized and existing under and by virtue of the laws of the United States. For jurisdictional purposes a national banking association is deemed to be a citizen of the state in which it is located.[9] It is not alleged in the original complaint that Bank of America is located in a state other than California.[10] It follows that, in so far

7. One who invokes the jurisdiction of a federal district court must allege in his pleading the facts essential to show jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189; Illinois Terminal R. Co. v. Friedman, 8 Cir., 208 F.2d 675, 676; Rule 8(a), Federal Rules of Civil Procedure.

8. Prior to the 1958 amendment of 28 U.S.C.A., sec. 1332 (Act of July 25, 1958, Public L. 85-554, sec. 2, 72 Stat. 415), it was established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen only of the state in which it is incorporated. See St. L. and S. F. Ry. Co. v. James, 161 U.S. 545.

9. Cope v. Anderson, 331 U.S. 461, 467; 28 U.S.C.A., sec. 1348.

10. In a brief filed in the district court appellant tacitly conceded that Bank of America has its principal place of business in San Francisco, California.

as the original complaint is concerned, appellant failed to plead facts showing diversity jurisdiction.

In new paragraphs XVI to XXVI, which appellant sought leave to add to the original complaint by amendment, it is alleged in effect that Transamerica but not Bank of America is the real party defendant in interest. It is further alleged that Bank of America is only an instrumentality of Transamerica. On the basis of these allegations, appellant argued at the district court hearing that the entity of Bank of America should be disregarded. If this were done, it was contended, Transamerica could be regarded as the only defendant and diversity jurisdiction would be thereby established.

The district court in its memorandum and order of January 28, 1958, rejected this argument. The court held that the complaint, as proposed to be amended, did not allege facts sufficient to show that Bank of America was not a separate and identifiable legal entity. Moreover, the court held, it would be inappropriate to accept such a basis of diversity jurisdiction inasmuch as Bank of America continued as a named party defendant in the action.

We do not understand that appellant is now contesting this ruling which, in any event, we hold to be correct. Appellant's present position with respect to diversity jurisdiction appears to be that if her motion to alter or amend the judgment of dismissal had been granted, thus enabling her to file an amended complaint in which only Transamerica was named as defendant, diversity jurisdiction would have been shown. This contention will be considered in connection with the discussion of the order denying the motion to alter or amend the judgment of dismissal.

The complaint as amended and as proposed to be amended contains a number of allegations designed to invoke juris-

diction on the ground that the action "arises under the Constitution, laws or treaties of the United States." 28 U.S.C.A., sec. 1331. Among the federal laws referred to as giving rise to the action are 12 U.S.C.A., secs. 93 and 94;[11] general provisions of the National Banking Act which, appellant argues, made it unlawful for Bank of America to fraudulently conceal from appellant that she was entitled to workmen's compensation benefits under the California statutes; section 2 of the Fair Labor Standards Act of 1938, 29 U.S.C.A., sec. 202, setting out a congressional finding and declaration of policy; and section 18 of that act, 29 U.S.C.A., sec. 218.[12]

The order dismissing the action in effect rejects the contention that allegations making reference to these and possibly other federal statutes show federal-question jurisdiction under 28 U.S.C.A., sec. 1331.

In our opinion the court was correct in so ruling. The gist of this action, in so far as the complaint by any possibility states a claim on which relief can be granted, is common-law fraud or conspiracy, and the violation of a duty under a California statute to notify appellant of her right to benefits under the California Workmen's Compensation Law. The rights created by the federal statutes to which reference has been made are not essential elements of such a cause of action. The fact that it may be necessary in the course of the litigation to construe these or other

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11. These statutes provide for suits against national banking associations by the Comptroller of the Currency, where the directors have knowingly violated or permitted any officer, agent, or servant of the association to violate any provision of the National Banking Act. They also permit individuals to sue the directors of such associations to recover damages resulting from specified violations of the act.

12. This statute specifies that no provision of that act shall excuse noncompliance with any federal or state law or municipal ordinance establishing stated requirements for employment.

federal statutes is not sufficient to give application to 28 U.S.C.A., sec. 1331.[13]

The remaining jurisdictional allegations of the original complaint as amended and as proposed to be amended are designed to invoke jurisdiction under the Civil Rights Act. In this connection appellant relies upon 28 U.S.C.A., sec. 1343 and 42 U.S.C.A., secs. 1983 and 1985(3).

Section 1343 provides that district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to redress the deprivation of rights resulting from four kinds of conduct or inaction. The first two of these, as defined in paragraphs (1) and (2) of section 1343, pertain to a conspiracy or other wrong mentioned in 42 U.S.C.A., sec. 1985. In order to determine whether appellant has stated any cause of action under either of these first two paragraphs of 28 U.S.C.A., sec. 1343, it is therefore necessary to look at 42 U.S.C.A., sec. 1985.

The conspiracies set forth in that section relate to interferences with the holding of public office and the performance of the duties thereof (subsection (1)); interferences with due course of justice (subsection (2)); and deprivation of the equal protection of the laws, or of equal privileges and immunities under the law, or hindering constituted authorities in affording equal protection, or intereference with federal elections (subsection (3)). Agnew v. City of Compton, 9 Cir., 239 F.2d 226, 233.

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13. Rosferans v. William S. Lozier, Inc., 8 Cir., 142 F.2d 118, 121. See, also, Beistline v. City of San Diego, 9 Cir., 256 F.2d 421. An additional reason why the reference to 12 U.S.C.A., secs. 93 and 94 is not helpful is that, in so far as a suit against a national banking association is concerned, these statutes authorize only a suit by the Comptroller of the Currency for the purpose of dissolving a national banking association. Actions by individuals to recover damages must be brought against the directors individually, and not the association.

There are no facts pleaded which would invoke subsection (1) or (2) of section 1985. Concerning subsection (3), there are general allegations to the effect that appellant was denied the equal protection of the laws and equal privileges and immunities under the laws. These are not allegations of fact but the statement of legal conclusions. There are no facts alleged which tend to show that appellees deprived appellant of these constitutional rights.[14]

It follows from what has just been said that the original complaint, as amended and proposed to be amended, does not state a cause of action under the first two paragraphs of 28 U.S.C.A., sec. 1343.

The third paragraph of that section relates to deprivations of a right, privilege, or immunity secured by the Constitution or any federal statute "providing for equal rights of citizens . . ." when such deprivation is accomplished "under color of any State law, statute, ordinance, regulation, custom or usage."

Appellant has alleged in effect that the acts of appellees of which she complains were done under color of state law. This general allegation, however, is not supported by the complaint read as a whole. A person does not act under color of state law unless he acts, or purports to act, on behalf of the state as a state official, or in conspiracy with a person so acting. Schatte v. International Alliance, 9 Cir., 182 F.2d 158, 167. There is no allegation that Bank of America or Transamerica acted, or purported to act, as a state agency.

There are allegations to the effect that appellees entered into a conspiracy with various state officials and agencies.[15]

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14. See Collins v. Hardyman, 341 U.S. 651, 661; Whittington v. Johnston, 5 Cir., 201 F.2d 810, 811.

15. The then State District Attorney, State Board of Control, State Industrial Accident Commission, and possibly other state officials and agencies.

But the subject matter of such asserted conspiracies, as alleged in the complaint, had nothing to do with any constitutional provision or statute "providing for equal rights of citizens. . . ." This is an essential element in stating a cause of action under section 1343(3).

It is therefore our opinion that the original complaint, as amended and proposed to be amended, does not state a cause of action under section 1343(3).

Paragraph (4) of section 1343 authorizes the recovery of damages or the securing of other relief under any statute "providing for the protection of civil rights, including the right to vote." The pleadings here in question do not contain allegations of a kind which give application to any such statute.

The second civil rights statute sought to be invoked by appellant is 42 U.S.C.A., sec. 1983. A right of action to recover damages or other relief is therein provided against any person who, under color of state law, subjects, or causes to be subjected, any person within the state "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

In order to state a cause of action under section 1983 it is necessary to allege facts showing that the purpose of the defendants in committing the acts complained of was to discriminate between persons or classes of persons. Agnew v. City of Compton, supra, page 231. In the instant case, as in the Agnew case, there are general allegations to the effect that appellees had such a purpose. But these general allegations are unsupported by the factual allegations of the complaint read as a whole, and are therefore inadequate to state a cause of action under section 1983.[16]

16. If any purpose of appellees is factually asserted in these pleadings, it is the private one of furthering their own business plans and avoiding the expenditure of funds.

The remaining civil rights statute cited by appellant, 42 U.S.C.A., sec. 1985(3), has been fully discussed in connection with the consideration of 28 U.S.C.A., sec. 1343.

It is our view that the district court correctly held in its memorandum and order of January 28, 1958, that the complaint, as amended and proposed to be amended, does not state a cause of action under the Civil Rights Act.

Having reached the conclusion that the pleading under discussion does not show jurisdiction on any ground, we hold that the trial court did not err in entering the order of January 28, 1958, dismissing the action.[17]

This brings us to the appeal from the order of April 18, 1958, denying appellant's motion to alter or amend the order dismissing the action. As before indicated, the motion thus denied is to be regarded as having been made pursuant to Rule 59(e), Federal Rules of Civil Procedure. The purpose of the motion was to change the decretal provision of the January 28, 1958, order from a dismissal of the action to a dismissal of the complaint, and to add a provision granting leave to file an amended complaint and to drop a party defendant.

Bank of America moves to dismiss the appeal from the order of April 18, 1958, arguing that it is not an appealable order. While Transamerica does not join in this motion, the ground asserted by Bank of America, if meritorious, would require dismissal of the appeal from this order as to both appellees.

No authority has been cited with specific reference to the appealability of orders on motions to alter or amend a judgment of dismissal made pursuant to Rule 59(e). A

17. Pursuant to Rule 15(a), Federal Rules of Civil Procedure, appellant had already amended her complaint once as a matter of course. Accordingly, she was not entitled to an order merely dismissing the complaint, and does not make such a contention here.

motion for a new trial gives the trial judge power to alter, amend, or vacate the judgment. Napier v. Delaware L. & W.R. Co., 2 Cir., 223 F.2d 28. If a motion for a new trial is denied, the order of denial may be reviewed for manifest abuse of discretion. Lavino v. Jamison, 9 Cir., 230 F.2d 909. We think it follows, or at least is sufficiently analogous to compel the conclusion, that an order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion.

The reasons given by the court for denying this motion were: (1) Bank of America is an indispensable party and therefore an amended complaint dropping the bank as a party ought not to be permitted; and (2) it appeared from the face of the proposed amended complaint that the claim for relief was barred by the statute of limitations.

All bases of jurisdiction, as asserted in the original complaint as amended and sought to be amended before the original hearing, have been found to be insupportable. The only possible basis of jurisdiction stated in the proposed amended complaint which appellant sought leave to file after entry of the order of dismissal is that of diversity of citizenship.

The gist of the cause of action which is possibly stated under the proposed amended complaint is for common-law fraud or conspiracy, or failure to perform a duty required by state statute. The longest period provided by any state statute of limitations which could possibly apply is four years.[18] With regard to section 338(4), however, governing

18. California Code of Civil Procedure, sec. 338(1)—an action upon a liability created by statute, other than a penalty or forfeiture; sec. 338(4)—an action for fraud or mistake; sec. 339(1)—an action upon a liability not founded upon an instrument in writing; sec. 343—an action not otherwise provided for.

actions for fraud or mistake, it is provided that the action is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The acts upon which appellant relies as having given rise to the cause of action occurred not later than 1939 or 1940. The only such act concerning which appellant alleges lack of immediate knowledge has to do with the bank's asserted failure to advise her of her rights under the Workmen's Compensation Law. As to this, however, appellant alleges that she learned in 1948 that her mother had given the bank notice of her illness and need for compensation. Her cause of action thus came into existence at that time.

The fact, as she alleges it to be, that she did not obtain conclusive proof that such notice had been given until 1953 is immaterial. The 1953 date has to do only with the discovery of evidence which would support her claim, not discovery of the claim itself. See 1 Witkin, California Procedure, Actions, sec. 143, pages 652-653, and cases there cited.

The ruling of the district court to the effect that the cause of action is barred by the statute of limitations was therefore correct. Accordingly, it was not a manifest abuse of discretion to deny the motion to alter or amend the judgment for the purpose of receiving an amended complaint containing this inherent defect. It is not necessary to decide whether the court was correct in holding that Bank of America was an indispensable party.

The remaining orders sought to be appealed from are dated May 7, 13, and 19, 1958. In the first of these orders the court granted in part and denied in part appellant's motion made on April 22, 1958, to correct the memorandum and order of April 18, 1958. Appellant did not by this

motion seek any specified change in the decretal provision of the April 18 order, but sought only changes in the recitals set out in the court's memorandum which preceded the order. The motion is to be regarded as in the nature of a petition for rehearing or reconsideration. Accordingly, it is not a final and appealable order.

By the order of May 13, the court denied a motion made on May 9, 1958, for "Relief From Order Under Rule 60b (Newly discovered evidence)." Since there had been no trial, this motion was improperly designated and is to be regarded as in the nature of a petition for rehearing or reconsideration. It was therefore not appealable.

By the order of May 19, the court denied a motion made on May 13, 1958, for "Relief From Order Under Rule 60b (Fraud)." Since, however, the only notice of appeal was filed prior to the entry of this order, we do not have jurisdiction to review it. See In re Forstner Chain Corporation, 1 Cir., 177 F.2d 572, 576.[19]

The appeal from the orders of May 7, 13, and 19, 1958, is dismissed. The orders and judgments of January 28 and April 18, 1958, are affirmed.

(Endorsed:) Opinion. Filed May 22, 1959.

PAUL P. O'BRIEN, *Clerk.*

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19. The asserted "fraud" consisted of a statement made to the court by opposing counsel at or about the time of the hearing on the motion to dismiss, to the effect that "if all of the facts stated by plaintiff were admitted to be true, this would be of no benefit to plaintiff." The statement complained of, whether or not true, was only an expression of opinion as to the law, and hence could not constitute fraud within the meaning of Rule 60 b), Federal Rules of Civil Procedure.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 453

MRS. CLAUDIA WALKER,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and TRANSAMERICA CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT TRANSAMERICA CORPORATION IN OPPOSITION

CHRISTOPHER M. JENKS,

Counsel for Respondent Transamerica Corporation

OLNEY, DAVIS, POST, HERRINGTON & SCHMIDT,

Of Counsel.

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OPINIONS BELOW

The opinion of the District Court was not reported. The opinion of the Court of Appeals for the Ninth Circuit is reported in 268 F.2d 16 and is reprinted in the appendices to the briefs of petitioner and re-

spondent Bank of America National Trust and Savings Association.

JURISDICTION

Although petitioner has stated in her petition that jurisdiction of this Court is invoked under 28 U.S.C. §1251(1), we think she means 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner has listed eight questions in her petition. Most of these questions relate primarily, if not entirely, to petitioner's supposed claim against Bank of America. Nevertheless, the petition taken as a whole and liberally construed might be deemed to raise two "questions" which relate to this respondent. The first is: Does a defendant lose the right to raise the defenses of lack of jurisdiction of the subject matter and failure to state a claim where the defendant fails to plead within twenty days of the service of the complaint, but does obtain an extension of time from the Court within the twenty-day period and files the motion within the time extended by the Court? The second is: Does the three-year California statute of limitations bar a claim for fraud where the complaint unequivocally shows on its face that the claim was discovered by the plaintiff more than seven years before the action was filed? The remaining questions have to do with national banks, and Transamerica is not a national bank.

STATUTES INVOLVED

California Code of Civil Procedure, §335:

"The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:"

California Code of Civil Procedure, §338:

"Within three years:

". . . .

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

". . . ."

STATEMENT OF THE CASE

The complaint in this case was filed October 24, 1955, although the controversy had its origin in 1939, when petitioner's mother had her "committed to the Stockton State Hospital". *In re Walker*, 32 Cal.2d 488, 490. Petitioner claims that the ailment upon which the commitment was based was caused by the conditions of her employment with Transamerica and Bank of America (Complaint, para. IX [at p. 9]) and that she should have been allowed workmen's compensation. Complaint, para. V. She alleges that Transamerica and Bank of America failed to disclose to her the fact that she was entitled to workmen's compensation, and that she did not learn of her rights until 1948. Petitioner concludes that the non-disclosure of her alleged rights constituted fraud.

Petitioner admits that she filed a claim with the California Industrial Accident Commission which was denied in 1949 and that this denial was affirmed without opinion by the California Supreme Court. Complaint, para. X (at pp. 23-24); [Second] Amendment to Complaint, para. XXII (at p. 13). Petitioner attempts to avoid the bar of the statute of limitations by alleging that, although she knew of her claim in 1948 (Complaint, para. X (at p. 23)), she did not have the evidence to support it until 1953. Complaint, para. IV.

Although only Transamerica and Bank of America were joined in this action, the complaint is replete with alleged acts by others, including Stanford-Lane Hospital, judges of California courts, a former governor of California, a former district attorney of San Francisco, a former United States attorney in San Francisco, her former physician, her former lawyer, and J. Edgar Hoover. Complaint, para. X.

The original complaint attempted to use diversity of citizenship as the basis for jurisdiction, although Bank of America is a national banking association located in California, and petitioner is a citizen of California. Complaint, para. III. Transamerica is a Delaware corporation. Complaint, para. III. Shortly after filing the original complaint, petitioner filed an amendment claiming jurisdiction under a civil rights statute (42 U.S.C. 1985 (3)), which applies to conspiracies to deprive persons of equal protection of the laws. [First] Amendment to Complaint, para. XV.

Before twenty days had elapsed from the service of the original complaint, we secured an extension of time from the District Court within which to plead or move. Within the extended period we filed a motion to dismiss. In response to the motion, the district judge filed an order on January 28, 1958, dismissing the action for lack of jurisdiction. Thereafter, petitioner filed various motions for additional relief, including a motion for leave to file a new complaint dropping Bank of America as a defendant. The district judge made a minor correction in one order, but, except for that, denied all of these subsequent motions and denied the request for permission to file the new complaint. The district judge pointed out in an order dated April 18, 1958, that it appeared on the face of the proposed complaint that petitioner's claim for relief was barred by the three-year statute of limitations, since petitioner admitted that she was aware of her claim in 1948 and did not file this action until October 24, 1955.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which upheld the decision of the District Court.

ARGUMENT

A. THE DECISION BELOW IS CLEARLY CORRECT

Petitioner tries to state two basic claims against this respondent, one for fraud and the other claim was for violation of a civil rights statute, 42 U.S.C. §1985(3).

The District Court and the Court of Appeals both held that petitioner failed to state a claim for violation of the civil rights statute. This was unquestionably correct. See *Collins* v. *Hardyman*, 341 U.S. 651. Even if petitioner could have stated a claim for violation of the civil rights statute, it would have been barred by the statute of limitations. See *O'Sullivan* v. *Felix*, 233 U.S. 318; *Wilson* v. *Hinman*, 172 F.2d 914 (10th Cir.); California Code of Civil Procedure, §§338(1), 338(4), 339(1), 343.

In any event, petitioner does not appear to make the Court of Appeals' decision regarding the civil rights statute one of the grounds of her petition. The result is that so far as respondent Transamerica is concerned, only the fraud claim is now involved.

The District Court and the Court of Appeals both held that the California statute of limitations governed with respect to the fraud claim. This was unquestionably correct. *Guaranty Trust Co.* v. *York*, 326 U.S. 99. The applicable California statute is Section 338(4) of the Code of Civil Procedure, providing a three-year period of limitations. Both courts below held that the statutory period began running in 1948 when petitioner, by her own admission in the complaint, first discovered her claim. This, also, was un-

questionably correct. *Lady Washington Consol. Co.* v. *Wood*, 113 Cal. 482, 45 Pac. 809.

Although respondents urged numerous other defenses to petitioner's complaint, it is not now necessary to consider any of them. The statute of limitations disposes of this case. It does so regardless of whether Bank of America is an indispensable party or not, and regardless of whether it must be deemed a citizen of California or not.

Petitioner's contention that the defenses of law to her complaint were not raised in time is likewise without merit. Within twenty days of the time we were served with the complaint, and before any pleading was due, we secured an extension of time within which to plead or move. Since our motion to dismiss was filed within the time extended by the District Court, there can be no question of our having waived any of our rights by failure to plead within twenty days of the service of the complaint. Moreover, lack of jurisdiction and failure to state a claim are never waived.

B. THERE IS NO CONFLICT OF DECISION

The cases which we have cited are controlling, and so far as we know there is no conflict with any other decisons, Federal or State.

CONCLUSION

The decision below was unquestionably correct, and there is no conflict of decision. For these reasons it is submitted that the Petition for Writ of Certiorari should be denied.

October 26, 1959.

Respectfully submitted,

CHRISTOPHER M. JENKS,
Counsel for Respondent
Transamerica Corporation.

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Of Counsel.